

DEC 13 2005

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS**

MARIA HELLENA JEBEHN,

Plaintiff,

v.

**JOSEPH JOHN HERRERA;
ALOHA COUNCIL BOY SCOUTS OF
AMERICA, INC.; and BOY SCOUTS
OF AMERICA, INC.,**

Defendants.

CIVIL ACTION NO.03-0027

**MEMORANDUM IN
SUPPORT OF MOTION FOR
RECONSIDERATION OF
ORDER GRANTING
DANILO T. AGUILAR'S
MOTION TO WITHDRAW
AS ATTORNEY OF RECORD**

I.

INTRODUCTION

In late November, 2005, Plaintiff's counsel discussed with Defendant's counsel the failure of the Defendant to comply with the terms of the settlement agreement. Counsel for Defendant advised he had lost contact with his client and intended to withdraw. It was agreed that the two motions, one to withdraw and one to enforce the settlement agreement could be heard together. However, on December 5, 2005, it was learned that Defendant's counsel had filed the expected motion but that it had been granted the same day it was filed.

1 The problem this leaves is that the Plaintiff has no one to serve with her motion to
2 enforce the settlement agreement.

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4 **II.**

5 **BACKGROUND**

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7 On September 10, 2004, Plaintiff and Defendant Joseph John Herrera entered into a
8 Settlement and Release. On September 13, 2004, the Court dismissed the action, but retained
9 jurisdiction to enforce the terms of the Settlement if necessary.
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12 Counsel for Plaintiff sent a letter dated November 17, 2005 to Defendant Herrera's
13 counsel demanding the payment of amounts in arrears under the Settlement.
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15 On December 5, 2005, Plaintiff was served with the Order Granting Danilo T. Aguilar's
16 Motion to Withdraw as Attorney of Record, Motion to Withdraw as Counsel, Notice of
17 Withdrawal of Counsel, and Declaration of Counsel in Support of Motion to Withdraw.
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20 **III.**

21 **ARGUMENT**

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23 **A. Standard of Motion for Relief from Judgment or Order**

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25 Although commonly referred to as one for "reconsideration," a motion made under Fed.
26 R. Civ. P. 60(b) is actually a "motion for relief from judgment or order." Under Rule 60(b), on
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1 motion and upon such terms as are just, the court may relieve a party or the party's legal
2 representative from a final judgment, order, or proceeding for the following reasons:

3 (6) any other reason justifying relief from the operation of the judgment.

4 Fed.R. Civ. P. 60(b) (6).

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6 Rule 60(b)(6) permits the court to review and grant relief from a judgment for "any other
7 reason justifying relief from the operation of the judgment. Such a rule, and particularly the
8 provisions of (b)(6), gives the courts ample power to vacate judgments wherever that action is
9 appropriate to accomplish justice." *White v. Investors Management Corp.*, 888 F.2d 1036, 1040
10 (4th Cir. 1989)(quoting 11 WRIGHT & MILLER, Federal Practice and Procedure ' 2864, pp.
11 211-12 (1973)). "Rule 60(b)(6), a catch-all provision, provides the trial court with essential
12 equitable power to do justice in a particular case." *Lloyd v. Carnation Co.*, 101 F.R.D. 346, 347
13 (M.D.N.C. 1984).
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17 One of the primary reasons that courts exercise this equitable power under Rule 60(b)(6)
18 is to cover unforeseen contingencies intended to be a means for accomplishing justice in
19 exceptional situations. "Once extraordinary circumstances or hardship is found, Rule 60(b)(6) is
20 to be liberally applied to accomplish justice." *U.S. v. McDonald*, 86 F.R.D. 204, 208 (N.D.Ill.
21 1980)(quoting 7 MOORE'S FEDERAL PRACTICE ¶ 60.27(2)).
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24 In this case, there exists an extraordinary circumstance why the motion for
25 reconsideration should be granted. Plaintiff and Defendant Herrera executed a Settlement and
26 Release. However, Defendant failed to pay as provided in the Settlement. A demand for
27 payment was sent to Mr. Aguilar, Defendant Herrera's counsel, whereby it was stated that if no
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1 payment was made by Herrera, Plaintiff would be forced to enforce the settlement agreement
2 with the Court. Mr. Aguilar informed Plaintiff that Mr. Herrera had already left for the United
3 States. He advised Plaintiff of his intent to withdraw but stated that the would do so by motion
4 so that Plaintiff could also move to enforce the settlement at the same time. Plaintiff was served
5 notice of the motion to withdraw only after the Court had already granted the motion, to the
6 prejudice of Plaintiff. *See Declaration of Michael W. Dotts.*

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9 **B. Plaintiff Was Not Provided with Notice and Was Not Given an Opportunity to be
10 Heard**

11 LR 83.5 (g)(4) provides that an attorney may withdraw from a civil or criminal case only
12 after order of the court upon motion and for good cause shown, and *after serving notice upon his*
13 *or her client and opposing counsel.*

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16 In this case, Plaintiff was not timely informed of counsel's motion to withdraw. Plaintiff
17 was only served notice after an order had already been issued by the Court granting counsel's
18 motion to withdraw.


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21 Plaintiff was entitled to be heard on counsel's motion to withdraw. Mr. Aguilar's notice
22 of withdrawal was not set for hearing thereby depriving Plaintiff of the opportunity to be heard.
23 Had Plaintiff been heard, Plaintiff would have sought Defendant's last known address or some
24 other way to contact the Defendant. Plaintiff's motion to enforce the settlement could also have
25 been properly heard because it would have been properly served.
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1 Accordingly in the interest of justice, this Court should grant Plaintiff's Motion to
2 Reconsider the Court's Order Granting Mr. Aguilar's Motion to Withdraw and schedule a
3 hearing on this matter.

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5 Respectfully submitted this 12 day of December, 2005.
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7 O'CONNOR BERMAN DOTS & BANES
8 Attorneys for Plaintiff

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10 By:


11 Michael W. Dotts
12 (F0150)
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